SUPREME COURT NO. 78852-9

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STACEY ZELLMER, Individually and as Co-Personal Representative of the Estate of Ashley Cay McLellan; and BRUCE McLELLAN, Individually and as Co-Personal Representative of the Estate of Ashley Cay McLellan,

Petitioners/Appellants,

Vs.

JOEL ZELLMER,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
The Honorable Brian Gain, Judge

SUPPLEMENTAL BRIEF OF PETITIONERS ZELLMER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal cases

Other Cases

Rules, Statutes and Others

I. NATURE OF CASE

Petitioners/Plaintiffs Stacey Zellmer and Bruce McLellan, biological parents and co-personal representatives for their 3-year old daughter, Ashley McLellan, ask this court to abolish the doctrine of parental immunity, reversing the summary judgment previously granted in this case.

Alternatively, the petitioners assert that the summary judgment should be reversed because several exceptions to the doctrine of parental immunity apply to the facts of this case.

Finally, the petitioners request that this court reject the defendant's request to expand parental immunity for the first time, so that immunity will shield the defendant/stepparent from liability for negligence. Even if immunity was expanded, the defendant here did not stand *in loco parentis* to the decedent and, therefore, did not qualify for the protection immunity generally provides.

II. ISSUES PRESENTED FOR REVIEW

1. Whether, after crafting numerous exceptions to its application, Washington should abolish the doctrine of parental immunity and adopt a "reasonable parent" standard, thereby allowing children to receive compensation for injuries they suffer through the negligence of others.

2. If the doctrine of parental immunity is allowed to survive, should parental immunity apply even though the child at issue is deceased, the child's mother and her former stepparent, the defendant, are divorced, and even though the "family unit" that parental immunity was designed to protect ceased to exist before the plaintiffs filed their lawsuit.

3. Whether Washington should, for the first time, expand application of the parental immunity doctrine to encompass stepparents.

4. If the doctrine of parental immunity is expanded to encompass stepparents, whether Washington should disregard the requirement that, in order to receive the benefit of immunities shield, a stepparent must stand *in loco parentis* to the injured child.

III. STATEMENT OF THE CASE

The parties: The petitioners/plaintiffs, Stacey Zellmer and Bruce McLellan, are the mother and father of Ashley McLellan. CP 5, CP 62, CP 67. Ashley was three years old in December of 2003 when she drowned to death in the defendant, Joel Zellmer's, pool. CP 5. When Ashley died, Joel Zellmer had been married to petitioner Stacey Zellmer for 88 days and was legally Ashley's stepfather. CP 70.

Before the plaintiffs filed their lawsuit, Stacey Zellmer's marriage to the defendant terminated and the parties divorced. CP 70, and *see*, *In re Zellmer v. Zellmer*, 04-3-12165-9 KNT.

Facts leading to Stacey Zellmer's 88 day marriage to the defendant: Four years ago, after Stacey Zellmer divorced Bruce McLellan, Ashley's father, Stacey met the defendant. CP 68-69. Shortly thereafter, Stacey became pregnant by the defendant. CP 68. On September 6, 2003, Stacey went to Idaho with the defendant where they married. CP 68.

Following the marriage, Stacey and Ashley began to stay with the defendant at his residence. CP 7. The marriage was marked by constant turmoil, and the defendant physically assaulted Stacey. CP 69. The defendant treated 3-year old Ashley in an intimidating manner. CP 71. During the marriage, the defendant was not allowed to engage in basic parental functions, such as deciding when or how to discipline Ashley. CP. 71. The defendant referred to 3-year old Ashley as a "lying, little bitch". CP. 66. The defendant did little to assist with Ashley financially, and he was unemployed during the entirety of the short marriage. CP 71.

During the short marriage, Stacey separated from the defendant and, when separated, she and Ashley left the defendant's residence and moved in with Stacey's parents. CP 69-70, 72.

Alternatively, during Stacey's marriage to the defendant, Ashley's father, Bruce, maintained a strong relationship with Ashley. CP 62-64, CP 67-68. Bruce continued to support Ashley financially, spent time weekly with her, and Ashley had a bedroom in Bruce's home. CP 63-64.

The defendant was aware that his swimming pool presented a danger for small children: An in-ground swimming pool was located in the back yard of the defendant's residence. CP 72. In December 2002, another small child nearly drowned in the defendant's swimming pool while under the defendant's sole care and supervision. CP 58. The defendant was subsequently warned that he should put a fence with a gate around the pool because it was not safe for small children. CP 59.

Nine months later, Ashley began staying at the defendant's residence. CP. 68. The defendant was aware that Ashley could not swim. CP 76.

Although the defendant did not take any precautions to make his pool safe, within days of marrying Stacey, he arranged for the purchase of a life insurance policy, insuring 3-year old Ashley's life in the event of her accidental death. CP 28, 72, 74, 75. The defendant named himself as a co-beneficiary under the policy. CP 72.

Shortly before Thanksgiving 2003, the defendant was again physically abusive to Stacey. CP 70. Stacey and Ashley began staying with Stacey's parents. CP 70. On November 30, 2003, four days before Ashley drowned, Stacey and Ashley returned to the defendant's residence. CP 70.

Ashley's drowning: On December 3, 2003, Ashley was home from daycare because she was ill. CP 72. Stacey asked the defendant to supervise 3-year old Ashley while Stacey went to work. CP 72. He agreed. CP 72.

That night, approximately six hours after Stacey left for work, Ashley was found floating, unconscious, in her pajamas, outside in the dark in the defendant's unheated swimming pool. CP 72, CP 27, CP 85.

After Ashley was found in the defendant's pool, Stacey never returned to the defendant's residence. CP 70. Stacy's divorce action preceded the petitioners' filing their lawsuit against the defendant. CP 70. The petitioners' lawsuit included claims for wrongful death, outrage, willful and wanton misconduct, and negligent supervision.

The Summary Judgment hearing: Prior to trial, the defendant, through his counsel, moved the trial court for summary judgment, relying of the doctrine of parental immunity. CP 15-25. Although openly critical of the doctrine, the trial court granted the defendant's motion. RP 4, RP 7, RP 2, RP 3. On appeal, the trial court's ruling on summary judgment was upheld. *Zellmer v. Zellmer*, 132 Wn. App. 674 (2006).

IV. ARGUMENT

A. The Standard of Review is De Novo:

Review of a grant of summary judgment is de novo. *Korslund v. DynCorp Tri-Cities Servs., Inc.,* 156 Wn.2d 168, 177 (2005). De novo review requires the appellate court "to examine all the evidence presented to the trial court, including evidence that had been redacted". *Folsom v. Burger King*, 135 Wn.2d 658, 663 (1998). After review, dismissal due to summary judgment is appropriate only if, after considering all of the evidence and the inferences from the evidence in a light most favorable to the non-moving party, reasonable people could reach only the conclusion that no genuine issue of material fact exists. *See, McKee v. American Home Products,* 113 Wn.2d 701, 705 (1989).

Whether parental immunity will apply to shield a parent from liability for injury to a child is decided on a case by case basis. *Merrick v. Sutterlin*, 93 Wn.2d 411, 415 (1980); also, *Zellmer v. Zellmer*, 132 Wn. App. 674, 679 (2006). Here, rather than analyzing the case in that manner, the court below addressed each component part of the case as though it was an unrelated, separate case. Review of this case requires that the case be viewed as a whole. The facts of the case are that the child victim died before plaintiffs filed their lawsuit, and that the family unit terminated

through divorce before plaintiffs filed their lawsuit, and that the tortfeasor was a stepfather who did not stand *in loco parentis* to the decedent.

Applying the proper standard of review and evaluating the case on all of its own facts establishes that it was error to grant summary judgment in this case.

1. The Doctrine of Parental Immunity in Washington should be abolished.

The doctrine of parental immunity prohibits children who have been injured or killed due to parental negligence from seeking civil redress for their injuries. *See, Sisler v. Seeberger*, 23 Wn. App. 612 (1979). The doctrine is based on an anachronistic public policy and is without a basis in either statute or English common law. This court should abolish the doctrine of parental immunity[1].

Parental immunity is strictly a creation of the American judiciary. The doctrine's origin in Washington can be traced to *Roller v. Roller,* 37 Wn. 242, 79 P. 788 (1905), one of the first judicial opinions in America to

[1] This court has the legal authority to abolish the doctrine. *See, Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980) (confirming parental immunity is a judicial creation); *and see Wyman v. Wallace*, 94 Wn.2d 99, 101-102, 615 P.2d 652 (1980) (a rule of law having its origins in the judiciary that has not been addressed by the legislature may be modified or abolished by the courts); *See also Freehe v. Freehe*, 81 Wn.2d 183, 189, 500 P.2d 771 (1972) (in abolishing inter-spousal tort immunity, court noted their decision was properly a matter for the courts since "the rule is not one made or sanctioned by the legislature, but rather is one that depends for its origins and continued viability upon the common law").

prohibit a child from seeking civil redress against a parent for injuries to the child caused by the parent. *See Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980) (outlining a history of the doctrine).

In *Roller*, the court barred a child from proceeding with a civil suit against her father for injuries she suffered after her father raped her. Although the plaintiff's father had been convicted of the rape, the *Roller* court asserted that, allowing the child to proceed with the suit would disrupt "harmony in domestic relations." *Id.* (overruled in *Borst v. Borst*, 41 Wn.2d 642 (1952)). Since the doctrine was created, several alternative rationales have been proposed to support the doctrine. *See*, *Zellmer v. Zellmer*, 132 Wn. App. 674, 678 (2006).

Since then, the circumstances under which the doctrine applies have been increasingly narrowed and the doctrine's various rationale have been consistently criticized[2]. As this court noted two decades ago, the

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[2] *Gibson v. Gibson*, 3 Cal.3d 914, 922 (1971) (referring to doctrine as "deadwood"); *Falco v. Pados*, 444 Pa. 372, 376, 282 A.2d 351 (1971) (doctrine serves "no rational purpose"); *Elam v. Elam*, 275 S.C. 132, 136, 268 S.E.2d 109 (1980) (calling the "family harmony" rationale "specious"); *Kirchner v. Crystal,* 15 Ohio St. 3d 326, 327, 474 N.E. 2d. (1984) (rationale underlying the doctrine is "outdated", "highly questionable" and "unpersuasive"); *Hebel v. Hebel*, 435 P.2d 8, 15 (Alaska 1967) (rationale underlying doctrine is "unpersuasive", "illogical"); *Rousey v. Rousey*, 528 A.2d 416, 416 (D.C. 1987) (concept is "out of date"); *Elkington v. Foust*, 618 P.2d 37,40 (Utah 1980) (doctrine has no foundation); *Glaskox v. Glaskox*, 614 So. 906, 911 (Miss. 1992) (doctrine rationale is "something of a mockery)". Comment, Parent-Child Immunity: The Case for Abolition, 6 SAN DIEGO L.REV. 286, 295-296 (1969). Jonathan Cardi, Apportioning Responsibility To Immune Nonparties: An Argument Based on Comparative Responsibility and the Proposed Restatement, 82 IOWA LAW REV. 1293, 1314 (1997); Children's Rights: A Renewed Call for the End of Parental Immunity, 27 LAW & PSY. REV, 123 (2002).

"trend in modern cases is to limit or entirely abolish parental immunity." *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980).

Rather than abolish the doctrine, Washington courts have whittled away at the doctrine by limiting its application through a variety of exceptions[3]. However, creation of numerous exceptions to the doctrine's application has resulted in inconsistent application of the doctrine and in decisions based in parental immunity that conflict with decisions based in other areas of the law.

For example, in Washington one parent can sue the other for injuries caused by negligence, but a child in that same family who is injured in the same way by that same parent is prohibited from bringing a negligence suit. Compare *Freehe v. Freehe*, 81 Wn.2d 183, 192, 500 P.2d 771 (1972) (abolishing inter-spousal immunity) with *Baugh v. Honda Motor Co.*, 105 Wn.2d 118, 712 P.2d 293 (1986).

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[3] See, *Borst v. Borst*, 41 Wn.2d 642 (1952) (parental immunity does not apply where injuries to child occurred when parent was engaged in the course of his or her employment); *Hoffman v. Tracy*, 67 Wn.2d 31 (1965) (parental immunity does not apply to injuries resulting from conduct constituting a temporary abdication parental responsibility); *Livingston v. Everett,* 50 Wn. App. 655, 751 P.2d 1199 (1988) (parental immunity does not apply when parental conduct was "willful and wanton"); *Sisler v. Seberger*, 23 Wn. App. 612, 596 P. 2d 1362 (1979) (parental immunity does not apply when family unit has been terminated by death of parent or child.); *Merrick v. Sutterlin*, 93 Wn.2d 411, 413-414 (1980) (parental immunity does not apply to injuries to child resulting from parents negligent operation of car).

Further, a child injured when a parent negligently operates an automobile can sue that parent for negligence, but a child injured when a parent negligently supervises the child cannot. Compare *Merrick v. Sutterlin*, 93 Wn.2d 411, 412 (1980), with *Livingston v. City of Everett*, 50 Wn. App. 655, 751 P.2d 1199, rev den, 110 Wn.2d 1028 (1988).

An illegitimate child can proceed with a civil suit for damages to secure financial support from his or her putative father, *Kuar v. Chawla*, 11 Wn. App. 363, 522 P.2d 1198 (1978), but a child needing financial redress for injuries caused by even the gross negligence of that same parent is barred from seeking financial compensation. *Jenkins v. Snohomish County Pub. Utility Dist. No 1*, 105 Wn.2d 99, 105 (1986).

Application of the doctrine results in the paradoxical situation where a parent simultaneously injures both his own child and a neighbor child through the same negligent act, yet only the neighbor child can seek civil redress against the parent for the resulting injuries.

Rather than addressing the apparent contradictions that result from application of the doctrine today, the Court of Appeals below simply noted that, although limitations have been imposed as to the type of parental conduct the doctrine shields, there has not, as yet, been a limit prescribed on the parties to whom it shields. *Zellmer v. Zellmer*, 132 Wn. App. 674, 679 (2006); but *see*, RESTATEMENT (SECOND) OF TORTS,

§859(G)(1) (providing that parental immunity should not bar tort claims between parent and child simply because the parties share a parent child relationship).

The Court of Appeals maintained that, although virtually all the rationales used to support the doctrine have been expressly rejected in Washington, the "need for discretion in performing parental duties" justified the doctrines continued existence. *Zellmer v. Zellmer*, 132 Wn. App. at 678-679.

While parental discretion in governing a child is a fundamental right, we have long recognized that that discretion is not without limits. *Prince v. Massachusetts,* 321 U.S. 158, 167 (1944); *Wisconsin v. Yoder*, 406 U.S. 205, 233-34 (1977) (power of parent may be subject to limitation if parental decision will jeopardize health or safety of the child or have a potential for significant social burdens).

In Washington, the need for parental discretion in performing even the most basic of parental duties, providing parental discipline, has not prevented the state from limiting parental discretion by allowing only what the state prescribes as "reasonable" discipline. See, RCW 9A.16.100 (list of what conduct may be unreasonable in disciplining child). There are even reasonable limits on a parent's discretion in providing something as basic as the type of medical treatment a parent chooses to provide to their

child[4]. Even a parent's discretion as to the medications a mother can take while pregnant has been subject to reasonable limits[5].

A parent has the prerogative and duty to exercise authority over their minor child, but clearly that prerogative has been subject to reasonable limits. That is all the plaintiffs ask in this case.

Immunity from responsibility for a civil wrong is the exception, not the rule. *See*, *Freehe v. Freehe*, 81 Wn.2d 183, (1972). The liability, or lack thereof, of the defendant in this case should be determined by asking: what would an ordinary reasonable and prudent *parent* have done in similar circumstances. *Gibson v. Gibson*, 3 Cal. 3d, 914, 921, 479 P.2d 648, 653 (1971) (emphasis in original); *Broadbent v. Broadbent*, 184 Ariz. 74, 81, 907 P.2d 43 (1995). The standard of "reasonableness" is well understood in tort law. The reasonable parent standard allows for parental discretion within reason. The reasonable parent standard also allows a child who is injured by the unreasonable conduct of another to receive compensation for the injury, just as anyone else would.

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[4] See *Lundman v. McKown*, 530 N.W.2d 807 (Minn. 1995); cert den. 516 U.S. 1096, 116 S. Ct. 828 (1996) (stepparent held liable after electing to treat 11-year old stepson's diabetes with practitioners of his religious faith rather than medical doctors).

[5] See *Grodin v. Grodin*, 102 Mich. App. 396, 301 N.W. 2d 869 (1980) (parental immunity did not prohibit child from bringing negligence action against mother for damage he suffered resulting from medication taken by mother while she was pregnant).

2. If the court does not abolish parental immunity, immunity should not apply to actions where the child is deceased.

> Of the jurisdictions which have considered the question, it appears that a majority have found an exception to the parental immunity doctrine where *either the child or parent* or both *are dead.*

Sisler v. Seeberger, 23 Wn. App. 612, 615, (1979) (emphasis added). Despite the plain language of *Sisler*, the Court of Appeals below, relying on *Chuth v. George*, 43 Wn. App. 640 (1986), declared that the "death of the tortfeasor was different from the death of the injured child" and, therefore, parental immunity should apply here. *Zellmer*, 132 Wn. App. at 687. That holding ignores the facts of this case, the language in *Sisler*, and holdings from a number of other jurisdictions where parental immunity was held not to apply in wrongful death cases involving death of the child[6].

The *Chuth* case is not well reasoned. For example, in *Chuth*, after recognizing that the death of a family member invalidates several of the policy reasons upon which parental immunity is based, asserted that

[6] E.g. *Brile v. Estate of Brile*, 321 Ill. App.3d 933, 748 N.E.2d 828 (2001) (deceased child severs family relationship for purposes of parental immunity); *Bushey v. Northern Assurance Co. of America*, 362 Md. 626, 766 A.2d 598 (2001) (parental immunity not applied because of death of the child); *Broadbent v. Broadbent,* 184 Ariz. 74, 907 P.2d 43 (1995) (court abrogates parental immunity where child deceased due to negligent supervision by mother).

additional policy reasons for the doctrine remain. *Id* at 648. However, the *Chuth* court didn't identify what those unnamed policy reasons were.

Here, unlike *Chuth* but similar to *Sisler*, the child's death was caused by a (step)parent, not a third party. Additionally, here, like *Sisler* but unlike *Chuth*, when the plaintiffs began their lawsuit, the parents divorced.

The Court of Appeals below incorrectly characterized the significance of the distinctions between this case and *Chuth* by asserting that the petitioners were arguing that marital dissolution is an inevitable consequence of the death of a child and, therefore, immunity should not apply in wrongful death cases. *Zellmer v. Zellmer*, 132 Wn. App. at 687. The petitioners made no such blanket argument. Instead, the petitioners asserted that, based on *Sisler* and similarly decided cases from other jurisdictions, the law generally holds that death of a child rendered parental immunity inapplicable. In addition, because one of the facts in this case was that after the child victim in this case died, and the parties did *actually* divorce, parental immunity cannot apply. One was not an inevitable consequence of the other, but when it occurred, as it did here, that fact cannot be ignored.

When the rationale upon which the doctrine of parental immunity is based no longer applies, it is error to grant immunity. See, *Borst v.*

Borst, 41 Wn.2d 642, 657, (1952); *Hoffman v. Tracy*, 67 Wn.2d 31, 37 (1965). Parental immunity does not apply when the child at issue is deceased. *Sisler v. Seeberger*, 23 Wn. App. 612, (1979); *Broadbent v. Broadbent*, 184 Ariz. 74, 81, 907 P.2d 43 (1995). Accordingly, parental immunity should not apply in this case.

3. If parental immunity is not abolished, the doctrine should not be expanded to encompass stepparents from liability.

The law generally, in jurisdictions that continue to recognize parental immunity, is that parental immunity does not apply to shield stepparents from suits for negligence brought by stepchildren. *See e.g.*, *Warren v. Warren*, 336 Md. 618, 629, 650 A.2d 252 (1994) ("We also decline to extend parent-child immunity to protect stepparents, regardless of whether they stand *in loco parentis* to the injured child"). *C.M.L. v. Republic Services, Inc.*, 800 N.E.2d 200 (Ind. App. 2003) ("For the reasons stated herein, we decline to extend parental immunity doctrine to apply to stepparents"); *Rayburn v. Moore*, 241 So.2d 675, 676 (Miss. 1970) (refusing to extend parent-child immunity to stepparents); *Xaphes v. Mossey*, 224 F. Supp. 578, 579 (D.C. Vt. 1963) (no parental immunity for stepparent in negligence claim regardless of whether stepparent was *in loco parentis*).

Additionally, prohibiting application of immunity to stepparents is consistent with the recognition that the law on occasion treats stepparents differently than natural parents. *See e.g.*, *Harmon v. DSHS*, 134 Wn.2d 523, 951 P.2d 770 (1998) (stepparent not chargeable with family expenses related to stepchild even though under same circumstances natural parent would be).

After 50 years of narrowing the circumstances under which parental immunity can be applied, this court should not expand the doctrine to include stepparents.

4. If the Court expands parental immunity to include stepparents, parental immunity does not apply here because the defendant did not stand *in loco parentis* to Ashley.

No court in any state has extended parental immunity to a stepparent without first finding that the stepparent stood *in loco parentis* to the child. *Warren v. Warren*, 336 Md. 618, at fn. 3, 650 A.2d 252 (1994). The rationale for that rule is simple. A stepparent who does not stand *in loco parentis* to their stepchild has not "earned" the benefit of parental immunities shield.

The determination of whether an *in loco parentis* relationship exists for purposes of applying parental immunity should be made "at the time the action was filed and thereafter". *Morris v. Brooks*, 186 Ga. App.

177, 179, 366 S.E. 2d 777 (1988). A defendant's *in loco parentis* status is determined for parental immunity purposes when a lawsuit is filed because courts have traditionally found that the objectives of immunity become relevant after an action is filed, not when the action accrues. *Id.*

In this case, the lower court did not address the fact that "at the time the action was filed" the child at issue was deceased and the defendant and the child's mother had terminated their marriage through divorce. The family unit had terminated. Any further relationship between the defendant and Ashley's mother would be governed by the terms of their divorce. Those are the undisputed facts of this case. Under those facts, it was simply not possible for the defendant to have been *in loco parentis* to Ashley at the time this action was filed. Accordingly, it was error to apply the doctrine of parental immunity to the defendant herein.

Even if Ashley had lived, and even if her mother had not divorced the defendant, and even if immunity was measured prior to Ashley's death, parental immunity still would not apply here because the defendant did not stand *in loco parentis* to Ashley at any time, let alone at the time the action was filed.

In loco parentis, in its plainest sense, means "instead of a parent". *State ex. rel. Gilroy v. Superior Court*, 37 Wn.2d 926, 933, 226 P.2d 882

(1951). Contrary to the Court of Appeals' assertion, actually attaining *in loco parentis* status involves more than simply providing limited financial support and a place for the child to stay. *See*, *In re Montell*, 54 Wn. App. 708 (1989) (court found some subjective intent on part of stepparent was required before *in loco parentis* status was attained): *see e.g., In re Marriage of Allen*, 28 Wn. App. 637 (1981) (stepmother who *devotedly* provided for, encouraged and otherwise raised deaf stepson from age 3 on, and who was solely responsible both for child and all family members learning to sign so child could communicate with family, found to have reached *in loco parentis* status); *Geibe v. Geibe*, 371 N.W. 2d 774, 782 (Minn. App. 1997) (finding that *in loco parentis* status required more than child residing with stepparent on weekends and six weeks during summer).

Here, the defendant did not have an *in loco parentis* relationship with Ashley at any time. The parties were married 88-days. During that time Ashley spent part of every week staying with her father, Bruce, not the defendant. CP 68, CP 63-64. Further, when Ashley's mother left the defendant after he physically abused her, Ashley stayed with her mother at her grandparent's home, not with the defendant. CP 69-70. During those periods, Ashley's wants, needs, and conduct were supervised by her mother and Bruce, her father; the defendant had no say in what she did

and had nothing to do with her. Further, when Ashley did reside at the defendant's with her mother, the defendant did not provide financial support for Ashley. CP 63, CP 68, CP 71. The defendant didn't even have a job during the parties' short marriage, and Ashley's financial and emotional needs were met by her mother and biological father, Bruce McLellan. CP 63, CP 68, CP 71. The defendant also did not fulfill the "standard" parental duties such as disciplining Ashley. CP 71. The defendant referred to 3-year old Ashley using derogatory terms of the type a parent would not use towards a child. CP 66. In other words, the defendant here did not demonstrate the subjective intent necessary to attain *in loco parentis* status.

The defendant in this case did not stand *in loco parentis* to the decedent at the time the petitioners filed their lawsuit. In fact, the defendant did not achieve *in loco parentis* status at any time in this case. Therefore, it would be error to allow the doctrine of parental immunity to shield the defendant from liability for his wrongdoing.

V. CONCLUSION

Our society has changed dramatically since 1905 when the doctrine of parental immunity was announced in *Roller*. Today, "[t]here is no justification for barring children from enjoying the same rights of legal redress for wrongs done to them that others enjoy". *Glaskox v. Glaskox*,

614 So.2d 906, 911 (Miss. 1992). This court should abolish parental immunity and should apply a "reasonable parent" standard in its stead.

If the doctrine is not abolished, parental immunity still does not apply in this case because the child at issue died as the result of the defendant's actions.

In the event the doctrine is not abolished and is found to apply despite Ashley's death, immunity should not be expanded for the first time to encompass stepparents.

In the event this court expands parental immunity to encompass stepparents, immunity does not apply here. Immunity applies if the stepparent stands *in loco parentis* to the child at the time petitioners filed their action. In this case, when the petitioners filed their action, Ashley was deceased and the parties' marriage had ended.

Even if 3-year old Ashley had not died, and even if her mother had not divorced the defendant prior to filing suit, under the facts of this case, summary judgment was improper because the defendant never stood *in loco parentis* to Ashley.

RESPECTFULLY SUBMITTED this 4th day of April, 2007.

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